

Before the
COPYRIGHT ROYALTY JUDGES
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Washington, D.C.

In the Matter of

Adjustment of Rates and Terms for
Preexisting Subscription and Satellite
Digital Audio Radio Services

Docket No. 2006-1 CRB DSTRA

**REBUTTAL TESTIMONY AND EXHIBITS
JOINTLY SUBMITTED BY
SIRIUS SATELLITE RADIO INC.
AND XM SATELLITE RADIO INC.**

VOLUME 3 OF 3

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ADJUSTMENT OF RATES AND TERMS FOR
PREEXISTING SUBSCRIPTION SERVICES
AND SATELLITE DIGITAL AUDIO RADIO
SERVICES

Docket No. 2006-1 CRB DSTRA

WRITTEN REBUTTAL TESTIMONY OF DR. ERICH A. JOACHIMSTHALER

1. I have been retained by counsel for Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Inc. ("XM") (collectively, "SDARS" (satellite digital audio radio services) or "Services") to respond to SoundExchange expert Dr. Michael Pelcovits' contention that monetary amounts paid by Sirius and XM for non-music programming – including Howard Stern – provide a benchmark for the value of the sound recording performances covered by the statutory license at issue in this proceeding. My testimony addresses a significant element of value that the SDARS derive from their non-music deals – the value of associating with powerful brands – that the SDARS do not receive from the right to play sound recordings. Dr. Pelcovits' failure to account for this important difference between non-exclusive music and exclusive non-music programming on the Services renders this aspect of his analysis invalid. I am not an economist and thus do not opine on the other aspects of Dr. Pelcovits' reports.

QUALIFICATIONS

2. I have been a professional in the branding and marketing field for more than twenty years. I am the founder and Chief Executive Officer of Vivaldi Partners (formerly

known as The Brand Leadership Company), a strategic marketing and brand strategy consulting firm with headquarters in New York and offices in London, Munich, and Hamburg. Before founding Vivaldi Partners, I co-founded a company with Professor David A. Aaker called Aaker - Joachimsthaler & Partners, which we sold in 1999 to Prophet, a brand strategy consulting firm. I served as a Chairman at Prophet before founding Vivaldi Partners.

3. I have provided expert brand and marketing advice to a diverse set of clients in industries such as telecommunications, automotive, consumer products, technology, financial services, entertainment, and energy, among others. Over the past fifteen years, I have been involved in building strong brands for many clients in North America and Europe, including Adidas, Bertelsmann, Deutsche Telekom, IBM, Levi's, Sanoma, and Siemens. I have worked for clients in extending brands into premium sectors of markets as diverse as food, automotive, durables, and fashion. I have assessed the value of brands and their potential for development in several hundred situations, and I have led research into the extension of brands or well-known trademarks.

4. I am a published authority on marketing strategy and building strong brands. My book, *Brand Leadership*, which I co-authored with David Aaker, was published by The Free Press in January 2000. My latest book, *Hidden in Plain Sight: How to Find and Execute Your Next Growth Strategy*, was published by Harvard Business Press in May 2007. I also have published extensively in academic journals such as the *Harvard Business Review*, *Journal of Marketing Research*, *Journal of Marketing*, *Journal of Consumer Research*, and *Sloan Management Review*.

5. I have held faculty positions at the Darden Graduate School of Business Administration at the University of Virginia, the University of Southern California, and the

University of Houston. In addition, I am Visiting Professor of Business Administration at IESE (Instituto Superiores de la Empresa) in Barcelona, Spain, one of the leading European business schools offering MBA and executive education programs.

6. In 1988, I completed a post-doctoral fellowship at the Harvard Business School. I received my Ph.D. in Business Administration, with emphasis on statistics and marketing, from the University of Kansas in 1985, where I also received my Master's Degree of Science, with emphasis in quantitative methods, in 1981. In 1979, I received my Economics Degree from the Fachhochschule Giessen-Friedberg, Germany.

7. I have served as an expert witness in several cases, including *Coty (Davidoff) v. CVS*, *Exide v. Enersys*, *Adidas America, Inc. & Adidas-Salomon AG v. Kmart Corporation*, and *Adidas America, Inc. & Adidas AG, v. Payless ShoeSource, Inc.* A more detailed summary of my training, past experience, and prior testimony appears as an appendix at the end of this testimony.

8. I am being compensated at my normal and customary hourly rate of \$700 per hour. My consulting firm is also being compensated for the time spent by its research staff at their normal and customary hourly rates.

MATERIALS REVIEWED

9. To carry out the foregoing assignment, I have reviewed and relied on, among other materials, the following:

- the original and amended Written Direct Testimony of Michael Pelcovits;
- the trial testimony of Michael Pelcovits and various fact witnesses from Sirius and XM;
- the Sirius and XM introductory memoranda and opening statements;

- certain Sirius and XM brand tracking reports and other internal company documents;
- my book with co-author David A. Aaker, *Brand Leadership* (Free Press 2000);
- Douglas B. Holt, *How Brands Become Icons: The Principles of Cultural Branding* (Harvard Business School Press 2004);
- Kevin Lane Keller, *Strategic Brand Management* (Prentice Hall 2003);
- press coverage on Sirius, XM, and the SDARS generally;
- press releases and websites of Sirius and XM;
- the agreements entered into by XM or Sirius with Howard Stern, Oprah Winfrey, Martha Stewart, NFL, NASCAR, NBA, MLB, and Opie & Anthony (collectively, the "Non-Music Content Providers"); and
- my discussions with Sirius and XM executives.

SUMMARY OF CONCLUSIONS

10. I conclude that the Services' deals with the Non-Music Content Providers cannot be directly equated with the right to play sound recordings in terms of value to the Services without taking into account significant differences between the Non-Music Content Providers, on one hand, and sound recordings, on the other. Specifically, the Non-Music Content Providers individually are powerful brands that contribute significant value to Sirius and XM above and beyond the value of the content itself. The right to play sound recordings, by contrast, is a category "point of parity" for Sirius and XM and does not differentiate Sirius' and XM's services from competing offerings in the way that the content from Non-Music Content Providers does.

11. My testimony is organized as follows: Part I discusses the nature of brands and the powerful role of brands in media industries. Part II analyzes Howard Stern, Oprah Winfrey, Martha Stewart, NFL, NASCAR, MLB, and Opie & Anthony under the four components of brand equity and concludes that each are powerful brands that differentiate Sirius and XM from each other and from terrestrial radio. Finally, Part III discusses some of the ways in which these powerful brands provide dimensions of value to Sirius and XM beyond the value of the content itself that Sirius and XM do not receive merely from playing sound recordings.

I. BRANDS PLAY A SIGNIFICANT AND VALUABLE ROLE IN MEDIA INDUSTRIES

A. The General Role of Brands

12. At the outset, I will introduce several generally accepted notions of brands. These notions are fundamental to understanding the value that Howard Stern, Oprah Winfrey, NFL, MLB, and the other Non-Music Content Providers bring to Sirius and XM.

13. A brand has two key types of components: the tangible and the intangible. The tangible components, or physical manifestation, of a brand may include names, logos, images, or designs. The more important components of the brand, however, and those that give it meaning, are the intangible components. As David Ogilvy, founder of the global communications agency Ogilvy & Mather, once stated, a brand is "the intangible sum of a product's attributes: its name, packaging, and price, its history, its reputation, and the way it's advertised."¹ Ogilvy refers here to everything that is stored in a consumer's memory and linked to a name of a product, service, company, person, or any other thing. This includes thoughts, feelings, emotions and experiences. Metaphorically speaking, a brand thus can be viewed much like a box in

¹ Keith Newton, *America's Greatest Brands Volume IV*, <http://www.americasgreatestbrands.com/volume5/council/keith-newton.php>.

someone's head – as people receive information about a brand, either positive or negative, they file it away in their mental box labeled with the name of the brand.

14. The concept of a brand is not limited to corporations, products, or services. Brands can consist of countries, cities, fictional characters, sports teams, rock bands, universities, and people² – essentially, any entity with specific associations existing in consumers' minds. It is, accordingly, widely recognized that people – particularly personalities in the public spotlight – can be considered brands in their own right. Kevin Lane Keller, in his leading text on branding and brand management, states:

Brands extend beyond products and services. People and organizations also can be viewed as brands. . . . This fact becomes particularly true when considering public figures such as politicians, entertainers, or professional athletes. . . . A special case of marketing people and organizations as brands is in the sports, art, and entertainment industries.³

In a global survey asking consumers to identify their favorite brands, product brands (*e.g.*, Starbucks), cartoon characters (*e.g.*, Hello Kitty), as well as personalities (*e.g.*, Oprah Winfrey and Lance Armstrong) were among those listed as consumers' top-ranking brands.⁴

B. A Strong Brand Brings Tremendous Benefits and Value to the Brand Owner

15. Strong brands provide a means of differentiating one product from another and a basis for generating preference, choice, and loyalty among consumers. Functionally speaking, products can be quite similar. Take, for example, the cluttered marketplace of music radio.

² DOUGLAS HOLT, *HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING* (Harvard Business School Press 2004).

³ KEVIN LANE KELLER, *STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY* 16-18 (2d ed. 2003).

⁴ Robin D. Rusch, *The Search is Over: Google Wins in 2005*, BRANDCHANNEL, http://www.brandchannel.com/features_effect.asp?pf_id=298 (2005 Readers' Choice Awards survey conducted by BrandChannel.com).

From the consumer's perspective, the purpose of music radio is to play music and provide entertainment, and, as such, all music radio shows serve broadly the same function for the consumer. A well-branded music show, however, has the ability to stand out from the crowd. It is the branded aspects of the show – such as the name, programming style, host, or other unique elements of the show – that invoke in consumers' memory the distinctive information he or she has stored about the brand. For instance, strongly branded music channels like Sirius' "Elvis Radio" and XM's "Willie's Place" (Willie Nelson) are unique and distinctive because they offer exclusive content not found elsewhere, while Sirius' "Shade 45" (Eminem) offers the pedigree of being co-produced by a music superstar.

16. Numerous studies demonstrate that brand attitudes directly impact consumers' purchasing decisions, with more favorable attitudes strongly influencing brand preference and brand choice. Consumer decision-making with respect to the purchase of goods and services is generally conceived as consisting of the following stages: need recognition, information search, consideration set formation, evaluation, purchase, and post-choice.⁵ Consumers rely on brands to help them make purchase decisions so that they do not have to conduct exhaustive search and evaluation processes. As a real-world example of this concept, studies have shown that when a consumer buys sports shoes, the brand of the shoes has a twenty-nine percent impact on the choice. In essence, whenever a consumer is deciding on a product or service, the brand is a significant factor in influencing the ultimate purchase decision.⁶

17. Although it is considered an intangible asset on the company's financial statement, a strong brand contributes real value to a company. In fact, the company's brand is

⁵ WAYNE D. HOYER & DEBORAH J. MACINNIS, CONSUMER BEHAVIOR (Houghton Mifflin 2003).

⁶ M. Fischer et al., *Brand Policy: Is it relevant for every company?*, DIE BETRIEBSWIRTSCHAFT, May/June 2004.

in many cases its most valuable asset. Marketers recognized this truism as far back as 1900, when John Stuart, Chairman of Quaker, stated: "If this business were split up, I would give you the land and bricks and mortar, and I would take the brands and trade marks, and I would fare better than you."⁷ More recently, academic work by Aaker and Jacobson has shown a relationship between brand equity and shareholder return.⁸ Firms experiencing the largest gains in brand equity have seen their shareholder return average thirty percent; conversely, those firms with the largest losses in brand equity have seen stock return average a negative ten percent. Another study has shown that a portfolio of high brand-value companies outperformed a total stock market index by a wide margin (twenty-three percent per annum versus sixteen percent) throughout most of the 1990s.⁹ And in the 2006 ranking by *BusinessWeek* magazine and the global branding firm Interbrand of the 100 top global brands based on each brand's financial value and the economic performance driven by the brand, the top-ranked brand was Coca-Cola, with an estimated brand value of \$67 billion.¹⁰

18. An additional benefit to the owner of a strong brand consists of sustaining relevance with consumers.¹¹ Especially for products and services targeting young adults,

⁷ ECONOMIST BOOK SERIES, BRANDS AND BRANDING (Bloomberg Press 2003).

⁸ David A. Aaker & Robert Jacobson, *The Financial Information Content of Perceived Quality*, JOURNAL OF MARKETING RESEARCH 191-201 (1994).

⁹ Thomas Madden et al., *Brands Matter: An Empirical Demonstration of the Creation of Shareholder Value Through Brands*, SOCIAL SCIENCE RESEARCH NETWORK, Working Paper, 2002.

¹⁰ *The World's Best Brands*, BUSINESSWEEK, Aug. 7, 2006, http://www.businessweek.com/magazine/toc/06_32/B399606globalbrands.htm.

¹¹ David Aaker, *The Innovator's Prescription: The Relevance of Brand Relevance*, STRATEGY + BUSINESS, Special Report, Summer 2004; DAVID AAKER, BRAND PORTFOLIO STRATEGY 103-127 (Free Press 2004).

relevance is needed to sustain the business amid constantly changing tastes and rapid turnover of core customers. A typical young adult target market is 18-24 year-olds, which means that every seven years, the brand is addressing a completely new group of consumers. Entertainment brands targeting young adults therefore must carefully manage their brands through constant refinement of brand positioning and user imagery, plus consistent investment in the brand. Not surprisingly, celebrities constantly update their brands by aligning themselves with the current times and trends, as can be seen in Jennifer Lopez's adoption of the new moniker J. Lo – a change inspired by the attempt to have more street credibility and a nod to her Bronx roots.¹²

19. A third benefit to the owner of a strong brand is building and sustaining competitive advantage over others in the market. Media businesses with a strong orientation toward building brands achieve competitive advantages in the following dimensions: advertising and communications, add-on revenue streams through retail and merchandising opportunities, partnerships and alliances, and attracting investment capital. For example, through carefully cultivating and building their brands, Oprah Winfrey, Martha Stewart, and Howard Stern have succeeded in standing out from their peers and creating new revenue-generating opportunities that capitalize on their brand names. As discussed below, for example, Howard Stern has moved beyond his original role as a radio show host to become a true entertainment brand across different media.

20. A final significant benefit of strong brands is that they provide the basis for brand extensions, which involves using an existing brand name to introduce new products or services. Brand extensions can open new revenue streams by bringing new customers to the brand franchise, increasing market coverage, or differentiating the core brand by new associations.

¹² Chris Grannell & Ruwan Jayawardena, *Celebrity Branding: Not as Glamorous as It Looks*, BRANDCHANNEL (Jan. 19, 2004), http://www.brandchannel.com/brand_speak.asp?bs_id=76.

For example, as described below, Oprah Winfrey's strong brand has allowed her successfully to enter into new businesses and to use brand extensions of the Oprah name to open untapped streams of revenue.

21. All of the above benefits that accrue to brand owners emerge from the fact that consumers tend to behave in a positive way toward strong brands. Specifically, consumers tend to exhibit: (a) greater willingness to consider the brand's products or services; (b) greater receptivity to marketing information about a brand's products or services; (c) stronger desire or aspiration for the brand's products or services; (d) greater loyalty and willingness to purchase or use the brand again; (e) greater tolerance toward the brand in case of product failure or problems; (f) greater willingness to pay for the brand's products or services than for other comparable products or services; and (g) greater willingness to recommend the brand to other consumers.

II. THE NON-MUSIC CONTENT PROVIDERS ARE STRONG BRANDS THAT DIFFERENTIATE SIRIUS' AND XM'S CONTENT FROM EACH OTHER AND FROM TERRESTRIAL RADIO

22. Dr. Pelcovits asserts incorrectly that amounts paid by the SDARS pursuant to agreements with strong brands such as Howard Stern, Oprah Winfrey, the NFL, MLB, and the other Non-Music Content Providers can be used without adjustment as a benchmark for the sound recording performance royalty rate at issue here (based on the asserted importance to consumers of the non-music content vis-à-vis the music content). He overlooks the fact that the entities and individuals with which Sirius and XM have entered into deals for non-music programming are powerful, renowned brands that differentiate Sirius and XM from each other and from terrestrial radio and provide significant dimensions of value – beyond that of the content itself – that sound recordings do not provide.

A. The Non-Music Brands Provide Valuable “Points of Difference” for Sirius and XM

23. Category “points of parity” are features or associations of an enterprise that are shared with all other enterprises and thus are not unique. Consumers view points of parity as necessary to a legitimate and credible product offering within a certain category – they represent necessary, but not sufficient, conditions for brand choice.¹³ For example, consumers would not consider a bank truly a bank if it did not: offer a range of checking and savings accounts; have convenient hours; and provide safety deposit boxes, automatic teller machines, and other such services.

24. The right to play sound recordings is a point of parity for radio businesses – whether the SDARS or terrestrial radio. They are the bare minimum needed for Sirius and XM to stay competitive, but they are not, by themselves, a source of competitive advantage. Rather, sound recordings are ubiquitous – freely and widely available on a myriad of terrestrial radio stations and from numerous other sources – and thus do not constitute a reason for consumers to subscribe to the SDARS. Accordingly, there is no basis for Sirius and XM to pay a premium for the right to play sound recordings; one does not pay a premium for a point of parity. To the extent music programming on the SDARS is a “point of difference” (discussed below), it is attributable to the significant value the Services add to the sound recording content through their innovative programming enhancements or to the premium that the Services already pay to operate exclusive branded channels such as Sirius’ Elvis Radio channel or XM’s XMX channel, which features exclusive shows with Bob Dylan, Ludacris, and Wynton Marsalis, among others.

25. In contrast to points of parity, “points of difference” are features or associations that are unique to the brand and are strongly held and favorably evaluated by consumers. The

¹³ Keller, *supra* note 3, at Section II.

notion behind points of difference is that because consumers face a multitude of options, they must be given a compelling reason to buy a product or service in the form of some unique and valuable feature or association.

26. The Non-Music Content Providers provide the compelling and exclusive content that serves as clear category points of difference for Sirius and XM. First, they provide Sirius and XM with exclusive content that can be heard neither on the other satellite radio service nor on terrestrial radio. For example, content from Howard Stern and Martha Stewart is available only on Sirius and not on XM or terrestrial radio. Likewise, Oprah Winfrey's XM channel content can be found only on XM and not on Sirius or terrestrial radio; Opie & Anthony can be found in uncensored form only on XM. Similarly, with respect to NASCAR and the NFL on Sirius and MLB on XM, no other source offers 24-hour channels solely devoted to these sports properties, providing nationwide coverage of games and teams as well as additional channels of programming offering "behind the scenes" looks at the events and participants.

B. Howard Stern, Oprah Winfrey, Martha Stewart, the NFL, MLB, NASCAR, and Opie & Anthony, Among Other Non-Music Content Providers, Are Strong Brands

27. The properties and personalities engaged by Sirius and XM, such as Howard Stern, Oprah Winfrey, Martha Stewart, the NFL, MLB, NASCAR, and Opie & Anthony possess considerable brand strength and create significant value for Sirius, XM, and their subscribers. In this section, I describe and assess the components of brand equity. I then analyze the brand equity of each of the Non-Music Content Providers and conclude that each is a strong brand that contributes significant value to Sirius and XM beyond the value of the non-music content alone.

1. The dimensions of brand equity

28. To explain how brands contribute value to their owners or to licensees such as Sirius and XM, I employ the concept of brand equity, a well-known and accepted concept for

analyzing brand strength. Brand equity is defined as the set of assets or liabilities that add or subtract from the value provided by a product or service.¹⁴ A brand with equity possesses four asset dimensions: (a) awareness, (b) associations, (c) perceived quality, and (d) loyalty.

(a) Awareness

29. Brand awareness denotes the familiarity of the brand and its branding elements (e.g., name, logo, consumer message, etc.) and is, accordingly, a critically important asset dimension. Without awareness, a brand has little hope of establishing other asset dimensions of brand strength. Awareness is thus a necessary, but not sufficient, element of brand strength.

30. When a celebrity such as Howard Stern or Oprah Winfrey, or other strong, renowned branded property such as the NFL or MLB, is associated with another brand, the awareness of that other brand tends to increase more rapidly. Because the brand becomes linked with the celebrity or other branded property in the minds of consumers, the brand will benefit not just when explicitly invoked by the other, stronger brand, but every time the stronger brand is brought to the awareness of consumers for any reason. For example, Howard Stern increases public awareness of Sirius not only when he appears in the press talking about Sirius or satellite radio, but even when he appears in the press for entirely unrelated reasons. Stern has become an icon for Sirius, and his presence in the public arena can be regarded as free advertising, so to speak, for Sirius, thereby making Sirius' branding more effective.

31. Based on my review of various Sirius and XM documents as well as my discussions with Sirius and XM executives, it is clear that the deals with the various Non-Music Content Providers were done not just for the value of the content, but also so that the fledgling SDARS could benefit from the enormous awareness boost they would receive through their

¹⁴ DAVID AAKER, *MANAGING BRAND EQUITY* (Free Press 1991); DAVID AAKER & ERICH JOACHIMSTHALER, *BRAND LEADERSHIP* (Free Press 2000).

associations with these famous properties. As XM's Stephen Cook stated in his written testimony:

XM . . . realizes tremendous benefits from adding well-established major brands to its programming. Our entire channel line-up, particularly on the news, talk and sports side, is replete with brands that are well-known to consumers, thanks to the extensive marketing efforts of other companies. . . . Our ability to market the new XM brand is greatly helped by aligning with established programming sources.¹⁵

(b) Associations

32. A second key asset of any powerful brand is strong, favorable, and unique brand associations. A brand has value when consumers hold such associations about that brand.¹⁶ Such brand associations are anything "linked" in memory to a brand¹⁷ and can be a visual image (the gecko lizard for Geico), a feature (iPod's design), an attribute (Volvo's safety), or a benefit (Crest's cavity prevention). Such associations form the core of how consumers evaluate a brand on an ongoing basis. As discussed more fully below, the Non-Music Content Providers' associations are strong, favorable among their target audiences, and unique.

(c) Perceived quality

33. Perceived quality, the third central aspect of brand equity, is "the customer's perception of the overall quality or superiority of a product or service with respect to intended purpose, relative to alternatives."¹⁸ Perceived quality is an important component of brand strength, as it is the source of many brands' competitive advantage; while perceived quality is an

¹⁵ Cook WDT ¶ 28.

¹⁶ Keller, *supra* note 3.

¹⁷ Aaker, *supra* note 14.

¹⁸ *Id.*

association, it is often separated out because of its strategic importance. The perceived quality of the Non-Music Content Providers is clear; as addressed below, they each are perceived by consumers as representing the highest standards in their respective fields.

(d) Loyalty

34. Loyalty, the final component of a strong brand, is "a measure of the attachment that a customer has to a brand. It reflects how likely a customer will be to switch to another brand."¹⁹ Typically, a brand with more loyalty has higher brand value. Brands like Harley-Davidson exemplify the highest levels of loyalty, where customers are so deeply loyal that they tattoo the brand logo into their skin.

35. As further addressed below, each of the Non-Music Content Providers possesses considerable brand strength based on the four dimensions of awareness, associations, perceived quality, and loyalty. Indeed, integral to the contracts for each of the Non-Music Content Providers is the recognition that these entities and personalities have high brand equity and that, by associating with these renowned brands, Sirius and XM are able to draw upon that equity. Such contractual associations, in turn, strengthen Sirius' and XM's own brands and differentiate them from terrestrial radio and from each other. In the following sections, I analyze the brand equity of each of the Non-Music Content Providers.

2. Brand equity of Howard Stern

37. **Awareness:** Howard Stern's brand strength is typified, at the outset, by the widespread awareness of him. It requires little discussion that Howard Stern has achieved high awareness among the general public and especially among his target demographic: 18- to 49-

¹⁹ *Id.*

year-old males.²⁰ Among this segment, Howard Stern is the most listened-to radio host.²¹

Prior to his move to Sirius, Stern boasted a 12-million-strong audience on his terrestrial radio program,²² one of the highest nationally.

38. **Associations:** Whatever one's subjective opinion of Howard Stern, his persona triggers strong, unique, and favorable associations in the minds of his fans. The best-known radio "shock jock," Stern stands for "antic audacity," "regular-guy standing," and brutal honesty – the "most provocative populist voice" of America, "denouncing the priorities and tastes of American elites."²³ Stern has been lauded as "a kind of deity, the mention of whose name brings glory to his acolytes," achieving his "godlike status" not through the traditional means of glamour, wealth, or beauty, but through his unabashed legitimization of "the dark side, the anarchic impulse, the savage beast in us all."²⁴ Positive or not, the name and brand of Howard Stern elicits instant associations in the mind of the consumer. Stern's unique standing is evidenced by the fact that some of the world's most influential and well-known personalities have appeared on Stern's show: David Letterman, the late John F. Kennedy, Jr., Robin Williams, Rudy Giuliani, Ben Affleck, Arnold Schwarzenegger, and many others.

39. **Perceived Quality:** As an entertainment brand, Stern's standing is at the highest level – he has proven to be an eminently bankable entertainer. Stern is a published author of

²⁰ See News Releases, *Howard Stern and Sirius Announce the Most Important Deal in Radio History* (Oct. 6, 2004), <http://investor.sirius.com/releaseprint.cfm?releaseid=151947>.

²¹ See "Howard Stern" Sirius Management Report, SIR00038000 at SIR00038001.

²² Daren Fonda, *Howard Stern: The \$500 Million Man*, TIME MAGAZINE, Dec. 16, 2005, <http://www.time.com/time/business/article/0,8599,1141769,00.html>.

²³ Richard Bernstein, *Books of the Times: Fantasies of a Regular Guy (With Worshipers)*, THE NEW YORK TIMES, Dec. 4, 1995.

²⁴ *Id.*

two books that topped The New York Times Bestseller list: *Private Parts* (1993) and *Miss America* (1995). The *Private Parts* movie ranked No. 1 in the opening weekend box office by grossing \$14.6 million, ultimately grossing \$41 million domestically.²⁵ In addition, the *Private Parts* original soundtrack became an RIAA-certified platinum album as of May 1997²⁶ and also made the Billboard Hot 200 chart.²⁷ Howard Stern's television show, The Howard Stern Show, beat out the popular Saturday Night Live in the 18- to 34-year-old male demographic in a number of markets.²⁸

40. **Loyalty:** Howard Stern has demonstrated significant customer loyalty through "his unequalled ability to migrate fans to other media."²⁹ Stern's successful ventures into other forms of entertainment (books, movies, music) highlight his loyal fan base. His highly publicized move from terrestrial radio to Sirius satellite radio provides an excellent example of loyalty toward the Howard Stern brand. After Sirius announced its deal with Stern in October 2004, Sirius added nearly a half-million new subscribers from the third quarter of 2004 to the fourth quarter of 2004 alone, compared to 180,000 new subscribers from the second quarter of

²⁵ IMDB.com, *Private Parts* (1997) - Box Office/Business, <http://www.imdb.com/title/tt0119951/business>.

²⁶ RIAA.com, *Private Parts* RIAA Rating, <http://www.riaa.com/goldandplatinumdata.php?table=SEARCH> (enter "Private Parts" in "Title" field).

²⁷ Billboard.com, Top Music Charts – Hot 100 – Billboard 200, <http://www.billboard.com> (search "Private Parts Soundtrack"; then follow "Album: The Billboard 200 5/10/1997" hyperlink).

²⁸ Lawrie Mifflin, *Howard Stern Has a TV Hit But Not a Knockout!*, THE NEW YORK TIMES, Feb. 16, 1999.

²⁹ See News Releases, *supra* note 20.

2004 to the third quarter of 2004, which brought its total to 1,143,258 subscribers.³⁰ When Stern commenced his show on Sirius in January 2006, there was an even more dramatic jump in the number of new subscribers, with Sirius adding a record 1,142,640 subscribers in the fourth quarter of 2005 and more than three-quarters of a million in the first quarter of 2006.³¹

3. Brand equity of Oprah Winfrey

41. **Awareness:** Like Howard Stern, there is little doubt that Oprah has achieved extremely high awareness among the general public and among her target demographic of 25- to 54-year-old adults.³² Oprah was and continues to be one of the most recognizable celebrity marketing icons, having been ranked number one on Forbes' Celebrity 100 list in 2005 and having been among the top ten for many years.

42. **Associations:** Oprah represents associations of strength, taste, and kindness, embodying not only "American values but also an American way of using and making culture."³³ Oprah's own highly-publicized, personal struggle for success – failed relationships, childhood sexual abuse, and a recurring battle to lose weight – speaks to the American public as

³⁰ See News Releases, *Sirius Satellite Radio Announces Fourth Quarter and Year-End 2004 Financial and Operating Results* (Jan. 26, 2005), <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=154690&cat=&newsroom=>; News Releases, *Sirius Satellite Radio Announces Third Quarter 2004 Financial and Operating Results* (Oct. 27, 2004), <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=150206&cat=&newsroom=>.

³¹ See News Releases, *Sirius Satellite Radio Reports Record Subscriber Growth and Revenue for Fourth Quarter and Full-Year 2005* (Feb. 17, 2006), <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=187963&cat=&newsroom=>; News Releases, *Sirius Satellite Radio Reports Strong First Quarter 2006 Results* (May 2, 2006), <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=194903&cat=&newsroom=>.

³² See "Oprah & XM" presentation (Dec. 7, 2005), XMCRB00141745 at 00141747.

³³ EVA ILLOUZ, *OPRAH WINFREY AND THE GLAMOUR OF MISERY* (Columbia University Press 2003).

a voice of strength, positioning her as the ideal role model. Oprah's philanthropic endeavors reinforce her role model status: her Angel Network helped raise \$50 million over five years, \$10 million for Hurricane Katrina victims.³⁴ On a larger scale, Angel Network "simply invite[s] all of us to make significant emotional improvements in problematic lives."³⁵ Indeed, Oprah Winfrey is more than a mere personality – she is "a cultural phenomenon."³⁶

43. **Perceived Quality:** To millions of Americans, an endorsement by Oprah represents a seal of quality. Oprah's Book Club is well-known for jump-starting book sales: the first eleven books that Oprah picked previously had been unranked in *USA Today's* top 150 bestseller list; after her endorsement, each immediately leapt into the top four on the list. Oprah's stamp of approval also ensures the books' staying power, allowing each to remain in the top twenty-five for an average of six-and-a-half weeks.³⁷ Oprah's perceived quality can, of course, be seen in her television career. Launched in 1986, the Oprah Winfrey Show is now almost twenty-one years old and has been the number one ranked talk show for nineteen consecutive seasons.³⁸ The show had won thirty-five Emmy Awards before Oprah stopped submitting it for consideration, and it is broadcast to 117 countries.³⁹

³⁴ About Oprah's Angel Network, http://www.oprah.com/about/press/about_press_oanfaq.jhtml.

³⁵ Illouz, *supra* note 33.

³⁶ *Id.*

³⁷ See News Release, *Oprah's Impact on Book Sales Bigger Than Expected*, Brigham Young University, Dec. 16, 2004, <http://byunews.byu.edu/archive04-Dec-butler.aspx>.

³⁸ Oprah Winfrey Show Trivia, http://www.oprah.com/presents/2005/20anniv/tows/tows_trivia.jhtml.

³⁹ *Id.*

44. **Loyalty:** Loyalty towards Oprah is extremely powerful. The Oprah Winfrey Show is watched by more than fifteen million people at least once a week, and *O, The Oprah Magazine* is considered the most successful magazine launch in recent publishing history, with a circulation of just over 2.6 million readers a month.⁴⁰ This loyalty manifests itself in huge boosts in sales of products endorsed by Oprah – in short, when Oprah speaks, her loyal fans listen and buy. A book's selection for Oprah's Book Club typically results in sales of more than one million copies, while the industry benchmark of 20,000 copies is considered a success.⁴¹ The LiveSTRONG wristband sold 900,000 pieces after it was featured on The Oprah Winfrey Show.⁴²

4. Brand equity of Martha Stewart

45. **Awareness:** The Martha Stewart name is extremely well known. The Martha Stewart brand appears in a vast array of forms, from her flagship *Martha Stewart Living* magazine to a host of other Martha Stewart-branded media forms. These include, for example, The Martha Stewart Show on television, Marthastewart.com on the Internet, the *Martha Stewart Weddings* magazine, etc. Martha's media properties reach 88 million people each month,⁴³ and The Martha Stewart Show is nationally syndicated, reaching 1.7 million viewers.⁴⁴

⁴⁰ MAGAZINE PUBLISHERS OF AMERICA, CIRCULATION TRENDS & MAGAZINE HANDBOOK 2004, http://www.magazine.org/Circulation/circulation_trends_and_magazine_handbook/11186.cfm.

⁴¹ See "Oprah – Programming and Marketing Investment Summary," XMCRB00141718 at XMCRB00141722 (Oct. 12, 2005).

⁴² *Id.*

⁴³ Diane Brady, *Martha, Inc.*, BUSINESSWEEK, Jan. 17, 2000, http://www.businessweek.com/2000/00_03/b3664001.htm.

⁴⁴ Burt Helm, *Queen of the Product Pitch*, BUSINESSWEEK, Apr. 30, 2007, http://www.businessweek.com/magazine/content/07_18/b4032050.htm.

46. **Associations:** Recognized as “America’s Lifestyle Queen,” Martha Stewart maintains associations of perfection and self-reliance.⁴⁵ Martha’s associations are strong, favorable, and unique. She has built her business empire around the home and her mass-market positioning – “very middle-American, with a slight aspiration – not to reach Rodeo Drive, but to live life a little better.”⁴⁶ Moreover, Martha’s strong associations have allowed her to bounce back from her recent jail time: shares of Martha Stewart Living Omnimedia have rebounded from \$11 a share shortly after her sentencing in July 2004 to \$31 per share at the time of her release on March 4, 2005.⁴⁷ Martha came back from prison “with a vengeance” with eight new projects and an unprecedented amount of celebrity and popularity.⁴⁸

47. **Perceived Quality:** Not surprisingly, the Martha Stewart brand is an internationally acknowledged symbol of quality and taste. It has been said that when consumers watch her show, visit her website, read one of her books, buy one of her products, or bake one of her favorite recipes, they hope that some of her taste will rub off on them.⁴⁹ Similarly, retailers line up to be associated with the Martha Stewart brand and name: branded product lines include Martha Stewart Everyday at Kmart, Martha Stewart Furniture with Bernhardt, and a new Martha

⁴⁵ Brady, *supra* note 43.

⁴⁶ *Id.*

⁴⁷ Pallavi Gogoi, *All Martha, All the Time*, BUSINESSWEEK, Aug. 9, 2005, http://www.businessweek.com/bwdaily/dnflash/aug2005/nf2005089_7875_db016.htm.

⁴⁸ *Id.*

⁴⁹ Mark Coultan, *Can’t Keep A Good Thing Down*, THE AGE AUSTRALIA, Jul. 17, 2007, <http://www.theage.com.au/news/management/all-things-american/2007/07/17/1184559749102.html?page=fullpage#contentSwap2>.

Stewart Collection of home products at Macy's. Martha Stewart Living Omnimedia oversees all branches of Martha's business empire and brought in \$288.3 million in revenues in 2006.⁵⁰

48. **Loyalty:** Similar to Oprah Winfrey, strong loyalty toward the Martha Stewart brand translates into increased sales. In publishing, Martha Stewart's first bestseller, *Entertaining*, has sold more than 500,000 copies and is now in its thirtieth printing (since 1982).⁵¹ In 1999, Kmart sold more than \$1 billion worth of Martha Stewart Everyday products, which are still sold today.⁵² This particular extension of the Martha Stewart brand highlights the "tremendous amount of loyalty" Martha has from her "rabid supporters," who already love and are willing to buy her products but also view purchasing these products as a sign of solidarity after the lifestyle guru's conviction.⁵³

5. Brand equity of the NFL

49. **Awareness:** The NFL is one of the most popular sports leagues in the United States. The 2006-2007 season drew a record 67,000 fans per game⁵⁴ and was the third consecutive season during which the league sold more than 17 million game tickets, bringing in revenue of approximately \$6 billion.⁵⁵ The NFL brand extends off the field as well, including

⁵⁰ Martha Stewart Living Omnimedia, Inc., Annual Report 2006 (Form 10-K) at 19 (March 14, 2006), <http://www.sec.gov/Archives/edgar/data/1091801/000095012307003756/y31800e10vk.htm>.

⁵¹ Brady, *supra* note 43.

⁵² *Id.*

⁵³ Emily Kaiser, *Martha Stewart, Kmart Extend Licensing Deal*, FORBES, Apr. 26, 2004, <http://www.forbes.com/newswire/2004/04/26/rtr1347082.html>.

⁵⁴ See NFL News Releases, *NFL Sets Paid Attendance Record*, Jan. 4, 2007, <http://www.nfl.com/news/story/9908132>.

⁵⁵ *In a League of Its Own*, THE ECONOMIST, Apr. 27, 2006, http://www.economist.com/business/displaystory.cfm?story_id=6859210.

particularly to television. The NFL's "Monday Night Football" has been on air since 1970, and according to Nielsen Media Research, the Super Bowl was the most-watched television show for 2006, drawing ninety million viewers.⁵⁶

50. **Associations:** The NFL is an American institution, known not just for its regular-season games but also for "Monday Night Football" and the league's post-season play culminating in the Super Bowl. The Super Bowl has come to be known as more than a championship football game, with the on-field play, the halftime show, and the commercials combining to create a cultural phenomenon on "Super Bowl Sunday." It is a testament to the strength of the NFL brand that even people who are not particularly interested in the NFL's primary content (i.e., football) still identify with and choose to associate with the brand – most notably by tuning in to the Super Bowl simply to watch the commercials.

51. **Perceived Quality:** The popularity of the NFL is, not surprisingly, a reflection of the perceived quality of entertainment provided by the league. The entertainment value comes not only from the caliber of play on the field, but, as noted, also from the Super Bowl's famed commercials. The Super Bowl commands the most expensive TV commercial air time, attracting advertising revenue from the renowned brands and businesses such as Frito-Lay, PepsiCo, Anheuser-Busch, Ford Motor, Monster, and Procter & Gamble. A thirty-second commercial commanded a staggering price of \$2.4 million in 2005;⁵⁷ the same half-minute will

⁵⁶ Nielsen Media Research, *The Nielsen Company's Guide to the Super Bowl*, NIELSEN, Jan. 31, 2007, <http://www.nielsenmedia.com> (search "Super Bowl"; then follow "4. The Nielsen Company's Guide to the Super Bowl: Charts & Tables" hyperlink).

⁵⁷ Krysten Crawford, *A Sneak Peek at Super Bowl Ads*, CNN MONEY, Feb. 4, 2005, http://money.cnn.com/2005/02/02/news/fortune500/superbowl_ads/.

cost \$2.7 million in 2008.⁵⁸ Compared to the \$2 million each spot commanded during the finale of the television show "Friends,"⁵⁹ it is clear that the NFL holds significant sway and influence with advertisers and viewers alike (a testament not just to the perceived quality of the NFL, but also to its high awareness, associations, and loyalty).

52. **Loyalty:** With its large number of teams and tradition-steeped heritage, the NFL boasts a large, passionate fan base. I already have noted the huge viewership of the NFL in general and the Super Bowl in particular. For the 2006-2007 season, games were at ninety percent stadium capacity, and a record ninety-seven percent of all games were sold out.⁶⁰ These numbers indicate that fans not only want to be a part of the football experience but also are willing to pay for it. Loyalty to the NFL is further exemplified by the popularity of fantasy football leagues, where fans compete against each other with their own virtual teams. The NFL itself has a website to facilitate this phenomenon, even charging fans \$129.95 to participate in an online fantasy football training camp. Television networks also have fought to be part of the NFL experience. In 2004, Fox and CBS agreed to a cumulative \$8 billion contract (\$4.3 billion and \$3.7 billion, respectively) extending their rights to NFL games for six more years⁶¹ – a clear testament to the strength of the NFL brand.

6. Brand equity of MLB

⁵⁸ Bruce Horovitz, *Super Bowl Ad for \$2.7m Also Buys MySpace Posting*, USA TODAY, http://www.usatoday.com/money/advertising/2007-05-10-fox-superbowl-usat_N.htm.

⁵⁹ Crawford, *supra* note 57.

⁶⁰ NFL News Releases, *NFL Sets Paid Attendance Record*, <http://www.nfl.com/news/story/9908132>.

⁶¹ *Late Season Games Can Be Moved to Monday Nights*, ESPN, Nov. 9, 2004, <http://sports.espn.go.com/nfl/news/story?id=1918761>.

53. **Awareness:** Major League Baseball needs no introduction – millions have grown up playing baseball in T-Ball and Little League, steeped in the lore of major league baseball greats. MLB is the quintessential national pastime, and its popularity continues to grow. In 2006, a record-breaking seventy-six million fans attended games at big league parks, while gate receipts for 2006 were approximately \$1.9 billion, an increase of eight percent over 2005.⁶²

54. **Associations:** Like football, baseball is one of the pillars of American culture and family tradition. The iconic advertising slogan “Baseball, Hot Dogs, Apple Pie, and Chevrolet” captures the powerful associations of baseball with the American way of life. The MLB also is closely associated with the World Series, which attracts millions of fans on television and scores more in person. Team rivalries, too, are abundant and heavily marketed, including the noted “Subway Series” between the New York Yankees and New York Mets. In sum, MLB’s associations are strong, deeply ingrained, and positive, making it an attractive property for advertising revenue.

55. **Perceived Quality:** With its high caliber of play, its storied history, and its place in the American heritage, MLB’s perceived entertainment quality similarly is extremely high. Like the Super Bowl, the World Series attracts enormous advertising revenue: a thirty-second spot cost approximately \$275,000 in 2001, ultimately bringing in roughly \$100 million for Fox.⁶³ Large and respected brands such as Master Card, PepsiCo, The Home Depot,

⁶² Kurt Badenhausen, *Baseball’s Big Bucks*, FORBES, Apr. 19, 2007, http://www.forbes.com/2007/04/19/baseball-team-valuations-07mlb-cz_kb_0419baseballintro.html.

⁶³ Kevin Downey, *Buyers Upbeat for World Series*, MEDIA LIFE MAGAZINE, Sep. 7, 2001, http://www.medialifemagazine.com/news2001/sep01/sep03/5_fri/news1friday.html.

Chevrolet, and Frito-Lay are sponsors of MLB, a testament to its perceived quality as well as the positive nature of its brand associations.⁶⁴

56. **Loyalty:** Loyalty towards MLB teams runs to extraordinary levels. The rivalry between the Boston Red Sox and New York Yankees is such that tickets for games at Boston's Fenway Park can scalp for more than \$300, and Yankee game tickets have been offered for thousands of dollars online.⁶⁵ Loyalty has spawned new industries and markets: baseball caps began as the official headwear of ball players and are now a standard favorite with sports fans;⁶⁶ the Baby Ruth candy bar is named after Babe Ruth; and some baseball cards are valued at hundreds of thousands of dollars, with baseball card trading now a \$700-million dollar industry.⁶⁷

7. Brand equity of NASCAR

57. **Awareness:** NASCAR, the largest sanctioning body of motorsports in America, governs more than 1,500 races in North America in addition to exhibition races in Japan and Australia. Studies have shown that NASCAR has increased its avid fan base by seventy percent since 1998, while those of other professional sports leagues have either remained stable or

⁶⁴ See News Releases, Red Carpet Rolled Out Again For All-Stars, Jul. 10, 2006, http://mlb.mlb.com/news/article.jsp?ymd=20060710&content_id=1551184&vkey=allstar2006&fext=.jsp.

⁶⁵ Tom Van Riper, *The Summer's Hottest Tickets*, FORBES, June 11, 2007, http://www.forbes.com/media/2007/06/11/concerts-music-baseball-biz-media-cx_tvr_0611tickets.html.

⁶⁶ *Happy 50th, Baseball Caps*, BBC NEWS UK, Apr. 27, 2004, http://news.bbc.co.uk/2/hi/uk_news/magazine/3660333.stm.

⁶⁷ Matt Krantz, *\$425m Deal Could Merge Last 2 Baseball Card Makers*, USATODAY, May 24, 2007, http://www.usatoday.com/money/media/2007-05-24-topps-upper-deck_N.htm.

declined.⁶⁸ Internationally, NASCAR is broadcast in more than 150 countries in 23 languages.⁶⁹ Market research firm PSB ranked NASCAR as the nation's number two brand in 2005, ahead of Google and iPod.⁷⁰

58. **Associations:** NASCAR prides itself on its associations of "performance, precision, and endurance."⁷¹ The organization promotes both the sport and the league itself as "highly entertaining" with its "mix of veterans and up-and-coming new talent," flavored with "traditional values" and a "real sense of belonging" for the viewers.⁷² On these two fronts, the perceived quality is unrivalled – there is no other motor sport that matches NASCAR. Sponsors of NASCAR accordingly see a valuable opportunity to target the "coveted consumer group" of young males⁷³ as well as middle-aged, middle-class married men.⁷⁴

59. **Perceived Quality:** NASCAR boasts its ranking as the No. 1 spectator sport in the United States, holding seventeen of the top twenty best-attended sporting events nationwide. NASCAR further asserts that one in three American adults follows the sport's 10-month long

⁶⁸ See "Sirius Board of Directors Meeting" presentation (Feb. 15, 2005), SIR00040053 at 00040055.

⁶⁹ NASCAR.com, About NASCAR, <http://www.nascar.com/guides/about/nascar/>.

⁷⁰ Brian O'Keefe, *America's Fastest Growing Sport*, CNNMONEY (originally published in FORTUNE MAGAZINE), Sep. 5, 2005, http://money.cnn.com/magazines/fortune/fortune_archive/2005/09/05/8271412/index.htm.

⁷¹ *Lincoln Sponsors NASCAR Fantasy Weekends Sweepstakes*, THOMASNET INDUSTRIAL NEWSROOM, Feb. 1, 2006, <http://news.thomasnet.com/companystory/475461>.

⁷² See "Sirius Board of Directors Meeting" presentation (Feb. 15, 2005), SIR00040053 at 00040068.

⁷³ O'Keefe, *supra* note 70.

⁷⁴ Natasha Kolar, *NASCAR Auto Racing Sponsors, Merchandise, and Advertising*, June 6, 2007, <http://www.nascartime.com/sponsors-nascar-auto-racing-sponsors-merchandise-and-advertising.html>.

season. This large fan base and the longest schedule in American professional sports attract a generous number of sponsors and advertisers.⁷⁵ More than 100 Fortune 500 companies are involved with NASCAR, including Levi's, L'Oreal, The Home Depot, DuPont, UPS, Budweiser, and Best Buy.⁷⁶ NASCAR's own "B2B" council makes it a goal to "discover reciprocal relationships, condense the business to business sales cycle, and learn how NASCAR sponsors can wield their position of influence."⁷⁷

60. **Loyalty:** NASCAR boasts a 75-million-strong fan base, with the most brand-loyal followers of all sports.—NASCAR prides itself on being ranked first in terms of brand loyalty among sports leagues. These fans purchase more than \$2 billion a year in NASCAR-licensed products; a jacket decorated with a favorite driver's sponsor logo costs up to \$300. This sort of "obsessive loyalty" is fueled by the fact that NASCAR drivers are more accessible to fans than other professional athletes, inspiring fans to collect almost every item related to their favorite driver.⁷⁸ Indeed, seventy-one percent of NASCAR followers said they "frequently or almost always" choose a product made by a NASCAR sponsor over one that was not due to that sponsor's involvement in the sport.⁷⁹ Fans are ninety-four percent more likely to have positive

⁷⁵ See "Sirius Board of Directors Meeting" presentation (Feb. 15, 2005), SIR00040053 at 00040057.

⁷⁶ O'Keefe, *supra* note 70.

⁷⁷ Kolar, *supra* note 74.

⁷⁸ David Harrison, *An Obsessive Loyalty*, ROANOKE TIMES, Apr. 10, 2005, <http://www.roanoke.com/news/roanoke/wb/xp-21597>.

⁷⁹ Kolar, *supra* note 74.

feelings about a NASCAR sponsor, and eighty-two percent of these fans say that NASCAR-related products are always good value for their price.⁸⁰

8. Brand equity of Opie & Anthony

61. **Awareness:** The popular radio show duo Opie & Anthony have garnered extensive attention over the years and have attained particularly high awareness among their target market of adult males. Before the pair joined XM, the Opie & Anthony terrestrial radio show was syndicated in seventeen U.S. metropolitan markets, including New York, Cleveland, Dallas, Las Vegas, New Orleans, and Washington, D.C.⁸¹ In 2004, Opie & Anthony generated massive publicity and press coverage through antics that ultimately resulted in their terrestrial radio show being terminated. Today, Opie & Anthony draw a broad audience not just on their XM radio show but also again through their terrestrial radio show on CBS, which re-signed the duo after their XM deal and brought them back as part of a syndication arrangement. Opie and Anthony's radio shows now air at the peak drive-time listening hours of 6 a.m. to 9 a.m. across the nation.⁸² The duo's CBS radio show undoubtedly draws attention to, and drives continued awareness of, the Opie & Anthony brand and attracts new audiences who desire uncensored content available only on XM.

62. **Associations:** As clear marks of differentiation, Opie & Anthony strive for notoriety, rebellion, and outrageousness. Their style triggers strong, unique, and favorable

⁸⁰ See "Sirius Board of Directors Meeting" presentation (Feb. 15, 2005), SIR00040053 at 00040058.

⁸¹ Larry McShane, *St. Patrick's Cathedral Shock Jock Returns to Satellite Radio*, ASSOCIATED PRESS, Aug. 5, 2004.

⁸² Paul Heine & Mike Boyle, *Opie & Anthony Get All Seven Roth Markets*, MEDIAWEEK, Apr. 20, 2006, http://www.mediaweek.com/mw/news/tvstations/article_display.jsp?vnu_content_id=1002383686.

associations in the minds of their fans, particularly adult males aged 18 to 49. Opie & Anthony, indeed, are recognized by the media for their “stunt[s]” and “brash” behavior, along with sometimes controversial material that earns them their “shock jock” reputation.⁸³ Even as Opie and Anthony themselves have “matured,” they have maintained that they will be as “edgy and crazy as ever.”⁸⁴

63. **Perceived Quality:** Although highly subjective, there is no doubt that Opie & Anthony are viewed positively by their target market as providing high entertainment value. Before they joined XM, Opie & Anthony’s terrestrial radio show was ranked No. 1 among male listeners aged 18-49 years in New York, Philadelphia, Boston, Dallas, Cleveland, and Buffalo.⁸⁵ When they re-joined CBS radio with the syndication deal in 2006, it was reported that the “new arrangement has helped to save CBS from the ratings plunge it suffered after Howard Stern jumped from broadcast radio to the Sirius satellite service.”⁸⁶

64. **Loyalty:** Opie & Anthony have engendered significant loyalty among their fans. Tellingly, after XM recently suspended the duo for one month in response to a controversial on-air stunt, an immediate uproar among their fans ensued. Many were incensed at the suspension. In a poll conducted by People Against Censorship, a reported 3,200

⁸³ Paul Farhi, *Opie & Anthony Get The Last Laugh*, WASHINGTON POST, June. 26, 2006.

⁸⁴ *Id.*

⁸⁵ *XM Satellite Hires Shock Jocks, Narrows Loss*, DOW JONES, Aug. 5, 2004.

⁸⁶ Marc Fisher, “Opie & Anthony,” *Down to Earth but Also Turning the Air Blue*, WASHINGTON POST, Jul. 23, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/21/AR2006072100291.html>.

subscribers cancelled their XM subscriptions, while another 1,600 said they put their subscriptions on hold until Opie & Anthony came back on the air.⁸⁷

III. THE SDARS HAVE BOTH RECOGNIZED AND BENEFITED FROM THE BRAND STRENGTH OF THEIR NON-MUSIC CONTENT PROVIDERS IN WAYS THAT TRANSCEND THE VALUE OF THE CONTENT ITSELF

65. Based on my review of Sirius' and XM's agreements with the Non-Music Content Providers, it is clear that the SDARS were well-aware of the benefits that they would reap from their Non-Music Content Providers' brand strength. Most importantly, both Sirius and XM were careful to include provisions granting them exclusive rights to transmit the non-music content and authorizing them to use the name, likeness, trademark, and/or logo of the Non-Music Content Provider to promote their service.⁸⁸ Some of the contracts also obligated the Non-Music Content Provider to promote the service in other media.⁸⁹

66. Sirius' and XM's intentional and exclusive association with these important brands has provided them with many valuable benefits in the real world. First, it has helped them increase their subscriber base. Associating with strong brands has given the services heightened levels of awareness needed to drive consideration and purchase and very loyal fan bases that drive loyalty and low churn rates.

⁸⁷ Kevin Carter and Mike Boyle, *Advertiser Ire Over Opie & Anthony Suspension*, MEDIA WEEK, May 21, 2007, http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003587607.

⁸⁸ See Sirius/Stern Agreement, SIR00010466, at SIR00010472 (Oct. 1, 2004); Sirius/Martha Stewart Living Omnimedia ("Martha Stewart") Agreement, SIR000S27583, at SIR00027591 (Apr. 12, 2005); Sirius/NFL Agreement, SIR00040084, at SIR00040096 (Dec. 2, 2003); Sirius/NASCAR Agreement, SIR00041599, at SIR00041616-19 (Feb. 18, 2005); XM/HARPO Radio ("Oprah") Agreement, XMCRB00034928, at XMCRB00034932 (Jan. 31, 2006); XM/MLB Agreement, XMCRB00034955, at XMCRB00034959 (Oct. 15, 2004).

⁸⁹ See Sirius/Martha Stewart Agreement, at SIR00027591.

67. The brand associations also have made it more likely that automobile manufacturers will pre-install satellite receivers in their vehicles, a key listening location for SDARS subscribers. When a car does not already have a built-in satellite radio receiver, subscribers need to purchase an add-on device and either pay to have it installed professionally or install it themselves, which marketers know will discourage consumers from subscribing to satellite radio. As such, it is critical for the success of the SDARS that they convince as many automakers as possible to pre-install these devices. I have consulted with several automotive manufacturers, and I know that they are exceedingly careful in their selection of features and options to offer in their cars because it costs them money that they can only recoup if consumers perceive the feature as valuable and are willing to pay extra for it. So an automotive manufacturer will hesitate to pre-install a satellite radio receiver unless it has some reasonable foundation to believe that consumers desire, and are willing to pay for, the device. The associations with the Non-Music Content Providers achieve this effect, as they are powerful brands with wide followings, and provide the SDARS with instant credibility as a service.

68. The associations also undoubtedly enhanced the SDARS' financing options. By definition, Sirius and XM operate services with enormous fixed costs up front to set up the SDARS before a single dollar of profit is realized. As such, access to capital in the financial markets is vital in order for the SDARS to have enough operating capital to survive until they turn a profit. Brand value reflects an important asset that can often be leveraged to secure that capital.⁹⁰

69. Perhaps the most important, yet most difficult to measure, benefit to the SDARS arises from the positive "halo effect" to Sirius and XM that results from the Services' association

⁹⁰ The branded content also can be expected to put the SDARS in a stronger strategic position to launch new products and services under their own brand names in the future.

with the Non-Music Content Providers. As noted above, a brand can be thought of as a box inside the minds of consumers. Brands, like all other ideas, are structured as networks of concepts.⁹¹ These concepts develop structural associations with each other via human experience. For example, the network for "July 4" might include associations with "barbecue," "fireworks," "U.S.A.," and "summer." The more frequently a person experiences barbecues on July 4, the stronger the association between July 4 and barbecues.

70. The associative network structure of consumers' knowledge about brands explains in part why marketers that are faced with the task of creating a new brand (e.g., Sirius or XM) often try to leverage consumers' knowledge about other well-known brands by contracting for the right to associate with them (e.g., Howard Stern, Oprah, Martha Stewart, MLB, NFL, Opie & Anthony, etc.). It is generally assumed that the positive associations and feelings that consumers have about the preexisting brand will transfer to the new offering.⁹² In fact, the structure and operations of the human cognitive system all but assure that this will happen. By signing Howard Stern to an exclusive deal, Sirius essentially imports many of the associations that form the mental conceptual network for Stern into its own set of associations. Consumers exposed to the massive amount of publicity generated by Stern and Sirius prior or subsequent to the launch of Stern's show on Sirius likely will link Stern to Sirius and vice versa. This linkage is of tremendous value to Sirius as it seeks to create and manage its own brand and realize all of the benefits that accrue to the owners of strong brands.

⁹¹ JOHN R. ANDERSON, *THE ARCHITECTURE OF COGNITION* (Harvard University Press 1983).

⁹² Paul A. Bottomley and Steven J. S. Holden, *Do we really know how consumers evaluate brand extensions? Empirical generalizations based on secondary analysis of eight studies*, JOURNAL OF MARKETING RESEARCH, 494-500 (2001); Susan M. Broniarczyk and Joseph W. Alba, *The Importance of the Brand in Brand Extension*, JOURNAL OF MARKETING RESEARCH, 214-28 (1994).

71. The same holds true for the other Non-Music Content Providers. As discussed above, Oprah has very favorable associations, including “strength,” “taste,” and “kindness.” These attributes become available to XM through its association with Oprah. Indeed, XM’s strategy documents regarding the Oprah deal show that XM carefully thought through the impact Oprah would have on its brand and that XM valued the deal accordingly.⁹³ Sirius’ deal with Martha Stewart is another example of this phenomenon – Mel Karmazin, CEO of Sirius, has referred to Martha Stewart Living as “the premier brand in lifestyle and how-to programming for women.”⁹⁴ The sports offerings on both Sirius and XM (*e.g.*, MLB, NFL, and NASCAR) likewise are valuable not only because they offer quality content, but also because they each represent a unique phenomenon in the minds of consumers. These offerings are part of the fabric of American culture, and there can be no question of the tremendous associational value to Sirius and XM of these deals.

72. Companies, including Sirius and XM, that successfully tie their brands to powerful celebrity brands, sports franchises, or other similar entities are in a position to realize significant value. Particularly in the world of music, entertainment, fashion, and sports, consumers choose to express elements of their self-conception that echo, or directly mirror, the self-expression that influential individuals, also called influencers or opinion leaders, develop through the products they use and promote.⁹⁵ As a result, brands associated with influencers have a greater likelihood of finding success in the wider market. Influencers also play a pivotal role in building a community of loyal users of the brand, as they engender interactive

⁹³ See “Oprah & XM” presentation (Dec. 7 2005), XMCRB00141745.

⁹⁴ See News Releases, Sirius Satellite Radio to Launch Exclusive Martha Stewart Channel, Apr. 18, 2005, <http://investor.sirius.com/releaseprint.cfm?releaseid=160512>.

⁹⁵ ED KELLER AND JON BERRY, *THE INFLUENTIALS* (Free Press 2003).

opportunities through fan clubs, chat rooms, and online discussion forums. The influencer strategy has long been employed by all types of companies, from athletic companies such as Nike that sign influential sports heroes as spokespersons and endorsers and then develop product lines around their personalities,⁹⁶ to retailers like Kmart and Macy's, which, as noted, have entered into successful partnerships with Martha Stewart to develop lines of household products.

73. The mere fact that the SDARS entered into agreements with the Non-Music Content Providers enhanced the credibility of the SDARS and, arguably, breathed life into what could have been stillborn businesses. In December 2003, the same month that Sirius inked its deal with the NFL, it had 261,000 subscribers.⁹⁷ That figure tripled after Sirius added NFL to its roster of sports programming – the number of subscribers rose to 662,000 in September 2004.⁹⁸ Prior to the NFL deal, Sirius had an insignificant number of subscribers and was not on the radar screen of anyone except those in the radio industry and early technology adopters. Sirius' association with the NFL gave it instant credibility. Similarly, its agreement with Howard Stern has been referred to as a life-saving deal for the company, bringing Sirius into the limelight and enhancing its reputation as a serious and viable business. In the fourth quarter of 2004, right after Stern announced his move from terrestrial to satellite radio, subscribers

⁹⁶ RANDALL ROTHENBERG, *WHERE THE SUCKERS MOON* 205-07 (Knopf 1994).

⁹⁷ See News Releases, *Sirius Satellite Radio Announces Fourth Quarter and Year-End 2003 Financial and Operating Results*, Jan. 28, 2004, <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=157236&cat=&newsroom=>.

⁹⁸ See News Releases, *Sirius Satellite Radio Announces Third Quarter 2004 Financial and Operating Results*, Oct. 27, 2004, <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=150206>.

increased to 1.14 million.⁹⁹ A year later, in the fourth quarter of 2005, the figure jumped to 3.3 million;¹⁰⁰ the number continued to rise as Stern's Sirius debut approached, reaching nearly 4.08 million in the first quarter of 2006.¹⁰¹ The Stern effect continued to produce results in the second quarter of 2006 as he settled in, with subscribers increasing to 4.67 million.¹⁰² As of the first quarter of 2007, Sirius had more than six million subscribers.¹⁰³ The same can be said for XM's deal with Oprah and the SDARS' various other deals with major celebrities and sports franchises.

74. Such credibility is not simply a matter of pride for the SDARS or a morale booster for their employees. Rather, this credibility makes it much more likely, for example, that car manufacturers will support satellite radio and that key retailers will stock and promote the SDARS' hardware. These benefits would be highly valued by any company, but they are critical to businesses like Sirius and XM that sell new and highly innovative products.

CONCLUSION

75. In summary, I conclude that the deals entered into by the SDARS with the Non-Music Content Providers bring tremendous brand value to the SDARS beyond that of the content

⁹⁹ See News Releases, *Sirius Satellite Radio Announces Fourth Quarter and Year-End 2004 Financial and Operating Results*, Jan. 26, 2005, <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=154690>.

¹⁰⁰ See News Releases, *Sirius Satellite Radio Reports Record Subscriber Growth and Revenue for Fourth Quarter and Full-Year 2005*, Feb. 17, 2006, <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=187963>.

¹⁰¹ See News Releases, *Sirius Satellite Radio Reports Strong First Quarter 2006 Results*, May 2, 2006, <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=194903&cat=&newsroom=>.

¹⁰² See News Releases, *Sirius Reports Strong Second Quarter 2006 Results*, Aug. 1, 2006, <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=205864&cat=&newsroom=>.

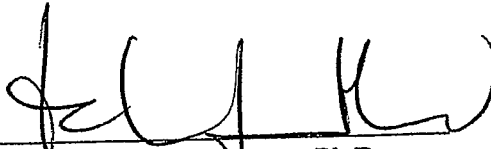
¹⁰³ See News Releases, *SIRIUS Satellite Radio Reports Strong First Quarter 2007 Results*, May 1, 2007, <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=240128&cat=&newsroom=>.

that sound recordings alone simply cannot. This added dimension greatly enhances the value of the Sirius and XM brands, which positions them for significant future value creation. Unless this added dimension of value is accounted for, it is simply inappropriate to use the Non-Music Content as a benchmark for the sound recording performance right.

Certification

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
July 24, 2007



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Work Experience

- 1999 Founder and Chief Executive Officer, Vivaldi Partners, New York, London,
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- 1998 - 1999 Chairman, Prophet Brand Strategy, New York and San Francisco.
- 1995 - 1998 Aaker-Joachimsthaler & Partners (AJ&P), Charlottesville and Berkeley.
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- 1990 - 1994 Alza Limited - Strategic Marketing and Reseach Consultancy, Barcelona.

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Erich is married to Daniela Gomez. Daniela was born in Santa Fe, Argentina and is an audiologist with a specialty for hearing disorders. They have two daughters, Sara, and Sophia and one son, Julian.

PUBLICATIONS

A. Publications

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B. Books & Book Chapters

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